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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 09 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a math tutor and teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we withdraw the director's conclusion that the petitioner, seeking to work in the United States as a tutor, may be classified as a member of the professions as defined at 8 C.F.R. § 204.5(k)(2). Similarly, the petitioner does not qualify for the classification sought as an alien of exceptional ability. Regardless, we concur with the director's ultimate conclusion that the petitioner has not established her eligibility for the benefit sought. Specifically, the petitioner's work as a tutor provides benefits that are too attenuated at the national level and has no prior experience, let alone a track record of success, developing and overseeing curricula for a national chain of learning centers.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Classification as a Member of the Professions or an Alien of Exceptional Ability

The petitioner submitted diplomas and transcripts documenting the following education:

1. A Bachelor of Elementary Education from Andres Soriano Memorial College in the Philippines in March 2000,

2. A Master of Business Administration (MBA) from De la Salle University in the Philippines in April 1995,

3. Eighteen credits towards a Master in Applied Statistics from the Graduate School of Polytechnic University of the Philippines in 1989, and

4. A Bachelor of Science in Mathematics for Teachers from the Philippine Normal College in April 1981.

The evaluation of the petitioner's foreign education only addresses the petitioner's Bachelor in Elementary Education and MBA. Moreover, the evaluation indicates that the petitioner received her Bachelor in Elementary Education in 1990, not 2000 as indicated on the transcript. The evaluation concludes that the petitioner has the foreign equivalent of a U.S. Bachelor of Education and a U.S. MBA. The director concluded that the petitioner qualifies for classification as a member of the professions holding an advanced degree. We acknowledge that the petitioner has an advanced degree. Moreover, she claims prior employment as a school teacher, an occupation expressly defined as a profession by statute. Section 101(a)(32) of the Act. At issue, however, is whether the *proposed* employment falls within a profession. Specifically, being a member of the professions does not entitle the petitioner to classification as a professional if she does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

The petitioner did not complete part 6 of the petition regarding the proposed employment. In his cover letter, counsel explains how the petitioner's work as a tutor will benefit the national interest but then lists a job description that is limited to teaching at a school. The petitioner cannot claim a school teacher occupation to qualify as a professional and simultaneously claim to benefit the national interest as a tutor. The petitioner has worked as a tutor since 2006 and all of the initial evidence relating to the national interest indicates that she intends to continue tutoring. We acknowledge that on appeal, the petitioner submits a letter from [redacted] who now asserts for the first time that the

petitioner will design and oversee curricula at future "learning centers" or "schools" nationwide Mr. [redacted] intends to open.

As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

As stated above, the petitioner has not established that she intends to return to working as an elementary or secondary school teacher. Rather, the initial filing suggested that the petitioner intended to work as an online and personal tutor. [redacted] Director of Operations for [redacted], asserts that the company's Tutorial Channel tutors must possess an advanced degree. [redacted] does not suggest that an advanced degree is the minimum requirement for entry into the occupation of math tutor. The petitioner failed to submit evidence that a bachelor's degree is the minimum requirement for entry into the tutoring occupation. Thus, the petitioner has not established that she qualifies as a member of the professions.

As the petitioner has not demonstrated that she qualifies as a member of the professions, the next question is whether she qualifies as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
>
> (C) A license to practice the profession or certification for a particular profession or occupation
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
>
> (E) Evidence of membership in professional associations

> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

If a petitioner has submitted the requisite evidence, U. S. Citizenship and Immigration Services (USCIS) determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

As discussed above, the petitioner possesses two baccalaureates and an MBA. Thus, she has submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A)

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought*

Counsel initially asserted that the petitioner "has at least ten years of full-time experience in the field of math education." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) explicitly requires evidence of letters from current or former employees to document the petitioner's experience. The petitioner failed to submit letters from her former employers confirming at least ten years of full-time experience. Thus, she has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(B).

> *A license to practice the profession or certification for a particular profession or occupation*

The petitioner submitted her provisional Public School Teacher Certificate. The certificate expired August 31, 2009, after the petitioner filed the petition. Nevertheless, the petitioner submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner provided no evidence relating to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Evidence of membership in professional associations

The petitioner submitted a 2002 certificate of membership in the National Organization of Professional Teachers, Inc. Thus, the petitioner has submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner provided no evidence relating to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In light of the above, the petitioner has submitted evidence that qualifies under three of the evidentiary criteria. Thus, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2). Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, in our final merits determination, we must determine whether the beneficiary's degree or license is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner's provisional license and membership in a professional teaching association do not distinguish her from other elementary or middle school teachers. At issue, however, is whether the beneficiary's license and education demonstrate a degree of expertise significantly above that ordinarily encountered among paid math tutors.[1] While a baccalaureate may not be required for entry into the occupation as a tutor, that does not necessarily mean that it is significantly above the education ordinarily encountered among paid math tutors. The record does not establish the percentage of paid math tutors with a baccalaureate. While the petitioner also possesses an MBA, the petitioner has not documented the relevance of an MBA to math tutoring such that possession of such a degree demonstrates exceptional ability as a math tutor. The petitioner has also not demonstrated that a provisional teaching license and a professional membership in an association with undocumented

[1] As the petitioner seeks an employment-based visa and intends to work as a paid math tutor, it is appropriate to compare her with other paid math tutors rather than including every volunteer who provides minimal tutoring on a limited, part-time basis.

membership requirements are indicative of or consistent with a degree of expertise significantly above that ordinarily encountered among paid math tutors.

In light of the above, the petitioner has not established her eligibility for the classification sought. Nevertheless, we will next consider whether she has established that waiving the alien employment certification process would be in the national interest.

National Interest

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. We include the term "prospective" to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The petitioner submitted considerable evidence about the importance of math instruction in the United States. The petitioner submits more evidence addressing the substantial intrinsic merit of the petitioner's area of work. The director, however, agreed that the petitioner works in an area of substantial intrinsic merit, math instruction, and we concur with that determination. The petitioner, however, cannot establish eligibility solely by a showing that the petitioner's field of endeavor has intrinsic merit or that the petitioner's occupation is important. *Id.* at 217.

Next we consider whether the proposed benefits of the petitioner's work, improved math abilities among the petitioner's students, would be national in scope. The director concluded that the proposed benefits would be limited to the petitioner's students and, thus, would not be national in scope. On appeal, counsel reiterates that the petitioner tutors students residing in various states online.

NYSDOT, 22 I&N Dec. at 217, n.3, provides the following examples to illustrate the proper analysis of whether an occupation has a national scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id.

Initially, counsel asserted that the petitioner tutors students individually, in small groups and online. Counsel lists the following current employment:

[redacted]

[redacted] confirms that the petitioner is one of the company's online math tutors as part of the company's Tutorial Channel. In addition, in his initial letter, [redacted] affirms that he is collaborating with the petitioner on books for teachers and students on logic and critical thinking and "developing a new curriculum" on these subjects.

On appeal, [redacted] asserts that one of his other companies, [redacted] "is planning to open innovative learning centers across the United States in the next two to five years" with the "first of these schools tentatively scheduled to open for the 2010-2011 school year." [redacted] asserts that the petitioner will, at some point, plan and coordinate educational policies and oversee this nationwide program. [redacted] did not indicate in his previous letter that the petitioner would be involved in overseeing a nationwide system of learning systems. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). Moreover, the record does not establish that Patterns Image Corporation already operates any type of nationwide system of learning centers.[2] Thus, [redacted] claims regarding the petitioner's possible future position appear far too speculative to consider.

We acknowledge that as an online tutor, the petitioner tutors individuals who do not reside locally. As noted above, the petitioner tutors for several organizations, only one of which claims to provide online tutoring services for non-local students. Tutoring a small number of non-local students has such a diluted impact at the national level as to be negligible. Thus, we are not persuaded that the benefits of an online tutor are national in scope.

As stated above, [redacted] asserted initially that the petitioner was collaborating with him on curricula that could be implemented nationwide. The record does not establish that [redacted] operates a company that is already known for providing curricula to different jurisdictions. Thus, once again, his projections about the future appear far too speculative.

Even if [redacted] claims about what the petitioner will do in the future are not too speculative, we must next determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. In addition, "exceptional ability" is not, by itself sufficient cause for a national interest waiver. *Id.* at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222. At issue is whether this petitioner's contributions in the field are of such unusual significance

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[2] The New York Department of States, Division of Corporations, indicates on their website, http://www.dos.state.ny.us/corps/[redacted] (accessed March 1, 2011 and incorporated into the record of proceedings), reflects that [redacted] is inactive based on a dissolution as of January 25, 2011.

that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

[redacted] asserts that the petitioner has been affiliated with the [redacted] as a tutor with [redacted]. [redacted] confirms that the petitioner demonstrated professionalism and was "a very effective math teacher working the most resistant students." Counsel has cited no legal authority for the proposition that the national interest waiver was intended as a blanket waiver for professional and effective math teachers or tutors.

[redacted] discusses the benefits of online tutoring, asserting that it is less expensive than private in-home tutors and offers a roster of tutors from which students can choose. [redacted] continues:

> Every Tutorial Channel math tutor has passed a rigorous selection process and has an advanced degree and specialized training in math. In addition to extensive subject knowledge, they must be caring, pleasant and patient as well as experts in communicating complex math concepts in simple terms.

[redacted] statement cannot be read to mean that Tutorial Channel requires an advanced degree in math as the petitioner's advanced degree is an MBA. Regardless, the petitioner's qualifications to work as a Tutorial Channel math tutor does not justify a waiver of the alien employment certification process. As stated in *NYSDOT,* 22 I&N Dec. at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* Finally, [redacted] confirms that the petitioner has "been helping her students get higher grades, build their confidence and increase their self-esteem and the parents of these students can attest to the outstanding results." This statement does not explain how the petitioner, an effective tutor, has influenced the field of math tutoring.

[redacted] asserts that he and the petitioner "have collaborated on a number of projects related to education." He further states that he and the petitioner "are currently working on writing books on logic and critical thinking for teachers and students at all levels with instructional activities customized for students with different ages, experiences and abilities." [redacted] does not indicate whether a publisher exists for these books, whether any school jurisdiction has expressed an interest in these books or whether the petitioner has any prior experience authoring such books. [redacted] concludes:

> Recognizing the importance of developing applied thinking skills in our students, my team, which includes [the petitioner], thought about developing a unique curriculum that encourages critical thinking and problem-solving. So far, it has shown extremely positive results. The students are learning successfully as confirmed by the higher scores that they are getting in standardized tests compared to their peers. At present, we

> have started to introduce this curriculum throughout the United States. We are confident that this curriculum, if adopted nationwide, will not only boost the scores of students in standardized tests but most important of all, it will produce students who will think critically and creatively. Hopefully, these students will develop a love of lifelong learning.

[redacted] does not explain where his team's curriculum has been utilized or who determined that it produced results. The record contains no evidence that this curriculum has garnered any attention in the trade media or other attention in the tutoring community beyond the petitioner's own circle of colleagues and collaborators.

On appeal, [redacted] discusses his plan to open schools in five cities where students perform below the international average. He asserts that the petitioner "has been involved with the project since its inception" and that she will eventually be the "Director of Operations." While [redacted] praises the petitioner's skills in moving this project forward, he does not suggest that the petitioner has any prior experience in this area. As such, the petitioner has not demonstrated that she has a track record of success with some degree of influence on the field as a whole.

Ultimately, the petitioner is seeking a waiver of the alien employment certification process to engage in minimal online tutoring services and develop and oversee nationwide curricula without any prior history of having done so. A single tutor's benefits are too attenuated at the national level to warrant a waiver of the alien employment certification process. Moreover, the petitioner has no track record in developing and overseeing national curricula such that we can determine that it is likely the petitioner will benefit the national interest through such activities.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.